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SEC

SERVICE DATE - JUNE 6, 2003

SURFACE TRANSPORTATION BOARD

DECISION¹

STB Ex Parte No. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RATE CHALLENGES TO BE
CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

STB Docket No. 41185

ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

STB Docket No. 41191

WEST TEXAS UTILITIES COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. 42054

PPL MONTANA, LLC

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

STB Docket No. 42057

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
AND UNION PACIFIC RAILROAD COMPANY

STB Docket No. 42059

NORTHERN STATES POWER COMPANY MINNESOTA
D/B/A XCEL ENERGY
v.
UNION PACIFIC RAILROAD COMPANY

STB Docket No. 42069

DUKE ENERGY CORPORATION
v.
NORFOLK SOUTHERN RAILWAY COMPANY

STB Docket No. 42070

DUKE ENERGY CORPORATION
v.
CSX TRANSPORTATION, INC.

STB Docket No. 42071

OTTER TAIL POWER COMPANY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

STB Docket No. 42072

CAROLINA POWER & LIGHT COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY

STB Docket No. 42077

ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: June 4, 2003

In a decision in STB Ex Parte No. 638, Procedures to Expedite Resolution of Rate Challenges to be Considered under the Stand-Alone Cost Methodology, served on April 3, 2003 (April 3 decision), the Board stated (slip op. at 9) that it would “review (and modify if necessary) existing protective orders in all pending [stand-alone cost (SAC)] cases to ensure that they comply with . . . expectations” regarding future submissions of confidential materials and prompt redaction of pleadings for review by in-house personnel. In a subsequent order served on April 25, 2003 (April 25 order), the Board invited the parties in the above-captioned rail rate cases² to review the existing protective orders governing these proceedings and, by May 9, 2003, jointly propose any modifications needed to comply with the April 3 decision. In response, the parties to these proceedings filed proposed modifications to their protective orders.

² At the time it served the April 25 order, the Board did not include West Texas Utilities Company v. The Burlington Northern Railway Company, STB Docket No. 41191, because it had not yet considered the pending petitions to reopen that proceeding. On May 9, 2003, however, the parties to that case sought modification of the governing protective order.

BACKGROUND

In the April 3 decision, slip op. at 9-10, the Board found that the parties' prevailing practice in SAC rail rate proceedings of filing virtually their entire case under seal, without filing anything in the public docket, is "contrary to [its] regulations, [the] practice in other types of proceedings, and the spirit of open government." (Footnotes omitted.) The Board indicated that, in the future, parties to such proceedings must file a public version simultaneously with any filing designated Highly Confidential (or Confidential).

The Board also found (April 3 decision, slip op. at 9-10) that "the public interest requires that each party to a SAC case prepare a partially redacted version (the Confidential Version) of each submission³ that contains its own 'highly confidential' material," and serve this partially redacted "Confidential Version" on the opposing party at the same time that it files its "Highly Confidential Version" with the Board. The purpose of requiring this Confidential Version is to facilitate the active participation of in-house personnel in significant litigation. To lessen the burden that this requirement might impose on parties and their outside counsel, the Board stated that parties could choose to serve the Confidential Version in electronic format only, and the Board also provided the filing party the alternative of simply telling the opposing party's outside counsel which information should be redacted prior to that party's in-house review.

In their recent filings, most of the parties to the above-captioned proceedings propose a 3-business-day delay for the filing of their public versions.⁴ They argue that the delay will provide them with more time to prepare these versions carefully, reducing disputes between the parties about what must be redacted, and reducing the possibility of inadvertent disclosure of highly confidential material, without unduly delaying review of these submissions by the public. Several parties also argue that the delay is necessary because preparation of the Highly Confidential Version of a filing requires extended effort by outside counsel and this must be completed before counsel can undertake preparation of a public version.

Most of the parties also propose a 1-business-day delay for the preparation and service of their Confidential Version, other than workpapers; and either a 5- or a 7-business-day, or an unspecified,

³ The Board did not distinguish between the various components of SAC rail rate proceeding filings, such as narrative, verified statements, and workpapers. The Board will distinguish between workpapers and the remainder of a SAC rail rate proceeding filing only with regard to STB Docket Nos. 42054 and 42071, as set forth below.

⁴ The parties to STB Docket No. 42059 did not address the filing of public versions.

delay to redact their workpapers for the other party's in-house review. In four of the proceedings,⁵ however, the parties propose preparation and service of their Confidential Versions contemporaneous with their filings with the Board.

DISCUSSION AND CONCLUSIONS

The timing of public filings is determined by the Board's regulations, and is intended to benefit the broader public. Thus, it is not an appropriate matter for negotiation or waiver by the parties in a protective order; public versions must be filed simultaneously with any Highly Confidential (or Confidential) Version in these cases.

The redaction of materials for purposes of in-house review presents a somewhat different situation. The designation of a second level of confidentiality ("highly confidential," as opposed to "confidential") for materials — with a different level of restriction on disclosure of these materials — is not a Board requirement. Parties, on their own, chose whether to include two levels of confidentiality in the protective orders that they proposed. Because the April 3 decision was issued after approval of protective orders proposed by parties, who did not have to contemplate preparing a Confidential Version of each Highly Confidential filing for their opponent's in-house review, the procedural schedules governing these proceedings (normally also proposed by the parties) may not have taken into account the time needed to prepare and serve a Confidential Version of each Highly Confidential filing. Accordingly, where parties have proposed a delay and a procedural schedule has been set but has not yet been concluded, the protective orders will be modified to allow additional time for parties to redact Highly Confidential filings, and prepare and serve confidential versions suitable for review by in-house personnel (a maximum of 1 business day for a Confidential Version or substitute list,⁶ except for workpapers, for which a maximum of 7 business days' delay will be permitted). In the future, however, parties to SAC rail rate proceedings should propose procedural schedules that allow the time they will need to comply with the redaction requirements by the due dates for their filings with the Board, in accordance with the April 3 decision.

⁵ STB Docket Nos. 42059, 42069, 42070, and 42072. In the latter three dockets, the parties propose the contemporaneous provision of a substitute list of material designated "highly confidential," but do not explicitly specify the contemporaneous preparation and service of a Confidential Version. The Board assumes that this omission was inadvertent.

⁶ Where parties choose to provide a list to the opposing party instead of redacting the materials themselves, it is in their interest to make the list as detailed and specific as possible, to ensure accuracy in the redaction process.

Accordingly, the protective order governing each of the above-captioned cases will be modified only as necessary to accommodate existing schedules that have not yet been concluded. Our modifications to the parties' proposed changes to their protective orders are set forth below.

STB Docket Nos. 41185, 41191, 42056, and 42077. The protective order in each of these cases is modified as proposed, except that (1) proposed paragraphs 1 (proposing a 3-business-day delay for public filings) and 3 (proposing an unspecified delay for redaction of workpapers) are omitted; and (2) the second and fifth sentences of proposed paragraph 2 are modified to read as follows:

(Second sentence) If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's Highly Confidential material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party's Highly Confidential material has been redacted.

(Fifth sentence) If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the Highly Confidential version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

STB Docket Nos. 42054 and 42071. The protective order in each of these cases is modified as proposed, except that (1) proposed paragraph 1 (proposing a 3-business-day delay for public filings) is omitted; and (2) the second sentence of proposed paragraph 3 is modified to read as follows:

To ensure that each party can respond with appropriate input from In-house Personnel to evidence or other material or information filed by another party, the parties shall cooperate to redact or otherwise identify, within seven (7) business days of the filing of such evidence or material, portions of such workpapers filed as Highly Confidential so that redacted versions thereof can be disclosed to a party's In-house Personnel.

STB Docket Nos. 42057. The protective order in this case is modified as proposed, except that (1) proposed paragraphs 1 (proposing a 3-business-day delay for public filings) and 3 (proposing an unspecified delay for redaction of workpapers) are omitted; and (2) the first and fourth sentences of proposed paragraph 2 are modified to read as follows:

(First sentence) If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's Highly Confidential material, the filing party shall also prepare and serve contemporaneously

upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party's Highly Confidential material has been redacted.

(Fourth sentence) If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the Highly Confidential version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

STB Docket No. 42058. The protective order in this case is modified as proposed, except that proposed paragraph 1 (proposing a 3-business-day delay of public filings) is omitted.

STB Docket No. 42059. The protective order in this case is modified as proposed.

STB Docket Nos. 42069, 42070, and 42072. The protective order in each of these cases is modified as proposed, except that (1) proposed paragraphs 17 (proposing a 3-business-day delay for public filings) and 18 (proposing a 7-business-day delay for redaction of workpapers) are omitted; and (2) the second sentence of proposed paragraph 16 is modified to read as follows:

If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's Highly Confidential material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party's Highly Confidential material has been redacted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposals to modify protective orders issued in the above-captioned cases are granted to the extent discussed herein.
2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary